IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-623

BANKERS LIFE & CASUALTY COMPANY,

Petitioner,

v.

HOWARD H. CALLAWAY, Secretary of the Army; F. S. CLARKE, Chief of Engineers, United States Army; and EMMETT LEE, District Engineer of the Jacksonville District of the United States Army Corps of Engineers,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Bankers Life & Casualty ("Bankers"), Petitioner herein, respectfully prays that this honorable court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above-captioned matter. That decision holds that even though an application for renewal is pending, the Corps of Engineers may, by mere inaction and without hearing, extinguish valuable rights under a permit issued to Bankers, despite the plain language of a statute which states that when renewal is timely sought, the license "does not expire" until "finally determined"

by the agency after affording the applicant an "opportunity to demonstrate or achieve compliance with all lawful requirements." (5 U.S.C. 558(c).)

The extraordinary result – reached without consideration by the District Court or briefs on the merits – thus poses a novel and fundamental question regarding the processes of regulation mandated by the Administrative Procedure Act: whether an agency may lawfully discharge its regulatory functions by the simple expedient of inaction.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 530 F.2d 625 (April 21, 1976) and is reproduced at Appendix A. The denial of Petitioner's Suggestion for Reconsideration or Rehearing En Banc, entered August 4, 1976 (unreported), is also reproduced at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTION PRESENTED

Whether, when timely application for renewal has been made, a license issued by the Corps of Engineers may expire as a matter of law because of agency inaction when no opportunity has been afforded to the applicant to demonstrate compliance with all lawful requirements.

STATUTES AND REGULATIONS INVOLVED

The issue in this case arises under Section 9(b) of the Administrative Procedure and Judicial Review Act (5 U.S.C. § 558(c)), which is set forth at Appendix B to this Petition.

STATEMENT OF THE CASE

This case presents a question of fundamental importance to our system of economic regulation through licensing. At bottom, the question is whether the Administrative Procedure Act permits an agency to allow valuable rights to expire by simply taking no action upon a renewal application and without affording the licensee opportunity to show that the licensed activities ought lawfully to be allowed to continue. The case involves Bankers' 13-year struggle "to extricate itself from the morass of bureaucratic inaction" (530 F.2d 626) resulting from the Corps' obdurate refusal to pass upon Bankers' application for renewal of a permit to continue its land fill activities. The court below held that the Corps could allow the permit to expire, extinguishing the rights conferred, by mere failure to act upon the renewal application. We ask this Court to decide whether this sort of regulation by inaction is permissible under the Administrative Procedure Act and our system of justice.

I. THE FACTS

The Permit. Bankers owns a 288-acre tract in Palm Beach County, Florida, bounded on the east by the Atlantic Ocean and on the west by the navigable intercoastal waterway. Bankers is the riparian owner both on the ocean and the waterway. In 1957, Bankers was granted a per-

mit by the Corps of Engineers under the Rivers and Harbors Act of 1899 (33 U.S.C. 403) to fill its property out in the west to the state and federally established bulkhead line of the waterway. Bankers started filling operations in 1957. In December 1960, Bankers requested and was granted an extension of the fill permit for an additional three-year period; the extended permit was to expire, by its terms, on December 31, 1963.

Prior to that date, Bankers applied to the Corps for a further extension. By letter dated December 27, 1963, the Corps advised Bankers that it was "our plan to issue the requested time extension immediately." However, the Corps related that it had received a request from a state entity, the Trustees of the Internal Improvement Fund, to defer action upon the application. Therefore, the Corps advised that it would "not be possible to grant an immediate extension" of the permit. Nevertheless, and even though the permit would not be renewed prior to its expiration date (December 31, 1963), the Corps specifically concluded that "the lapse in permit will have no effect insofar as the Corps of Engineers is concerned."

Between December 1963 and 1969, the Corps took no action on the application for renewal of Bankers fill permit. During that five-year period, Bankers sought to reach a negotiated settlement with the state and local agencies which had asserted an interest in its activities. These efforts proved fruitless.[1] Although the Corps continued to refuse to take action, it clearly recognized that Bankers'

[1] Five and one-half years after the application for renewal of permit had been filed, the Village of North Palm Beach, within which the property is located, informed Bankers that a permit would be granted; almost immediately thereafter the Village undertook to rescind this action.

application for renewal of permit was still before it. In a letter dated July 18, 1969, it insisted that "written approval of the Trustees of the Internal Improvement Fund be furnished before *further action* can be taken on your application" (emphasis supplied).

Bankers' First Efforts to Compel the Corps to Act. After five years, it was evident that inaction by the Corps of Engineers could not be resolved through negotiations with state and local bodies. Bankers therefore turned to the courts, in a suit against the Corps and local authorities brought in the United States District Court for the Southern District of Florida.[2] In this action it sought (i) to mandamus the District Engineer of the Corps to grant an extension of the fill permit which had been pending before him for over five years; and (ii) an order of the district court that, upon completion of the filling project, title in the land should be quieted in Bankers. The action was premised upon Bankers' belief that a grant of the permit extension was a purely ministerial act which the Corps was required to perform; and that the Trustees were not authorized to require a local permit in order to quiet title in Bankers because of the "Savings Clause" of Chapter 57-352 (General Laws of Florida) which established new procedures with respect to the title of submerged lands in the states.[3]

[2] *Bankers Life & Casualty Co. v. Village of North Palm Beach, Florida, et al.* (Case No. 69-1053) (S.D. Fla. 1971).

[3] The Savings Clause provides, in pertinent part, that

> The provisions of this act shall not affect or apply to . . . the extension or addition to existing lands bordering on or being in the navigable waters . . . which was commenced or application for permit to fill which was filed with the United States Corps of Engineers prior to [June 11, 1957].

The district court agreed on both points. On appeal, the Fifth Circuit reversed.[4] As to the first of Bankers' contentions, it held that "the Corps of Engineers does not grant or deny a permit as a purely ministerial act" and that because the entry of mandamus would have the effect of circumventing the Corps' exercise of discretion, the mandamus action was "not ripe for judicial determination." On the question of title, the Court of Appeals found that there existed a factual dispute whether Bankers had actually started filling operations prior to June 11, 1957 and remanded this question to the District Court for further consideration with the suggestion that "matter of land titles" might better be resolved in the state courts. *Bankers I, supra,* 998-1003.

Pursuant to the opinion of the Fifth Circuit, the district court deferred further decision pending the resolution of the state law questions by a state court. Accordingly, Bankers instituted a complaint for declaratory relief and to quiet title in the Florida courts against state officials.[5] Bankers has prevailed before the trial and intermediate appellate courts on its claim that it was within the Savings Clause of the Florida statute and entitled to an order quieting title in it as against the Trustees. As of this writing, the matter is pending in the Florida Supreme Court on the Trustees' appeal.

Bankers Second Attempt to Obtain Action by the Corps – the Instant Case. At the same time as it instituted the

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[4] *Bankers Life & Casualty Co. v. Village of North Palm Beach, Florida,* 469 F.2d 994 (5th Cir. 1972); *cert. denied,* 411 U.S. 916 (1973) (hereinafter referred to as "Bankers I").

[5] *Bankers Life & Casualty Co. v. Askew, Governor, et al.,* Circuit Court for Leon County, No. 73-1918.

state court proceeding regarding title to the land, Bankers renewed its efforts to secure a determination under federal law from the Corps on its still pending application for renewal of permit. Over time, since the Trustees first voiced their objection, the Corps has increasingly acquired new statutory obligations to consider various environmental and economic factors. Bankers has persistently contended that the Corps has misconstrued certain of the standards; as the court below itself noted, there is a "serious question about the scope" of the requirements the Corps seeks to impose upon Bankers. (530 F.2d 635, fn. 14.) Moreover, the favorable results to Bankers in the state court do not, of themselves, entitle Bankers to resume land filling operations: it *still* needs authorization from the Corps. Accordingly, in an effort to obtain *some* action on these federal matters, Bankers instituted the present lawsuit.[6]

Unlike *Bankers I,* the instant complaint does not seek an order directing the Corps to grant a renewal of the permit. Rather, it asks the district court to (i) adjudicate the present legal status of the application for extension of the permit filed in December 1963 which is still before the Corps; and (ii) to direct the Corps to exercise its discretion, one way or the other, on such application through the institution of proceedings which must be carried out under the Administrative Procedure Act ("APA"). The substantive bases of Bankers' complaint in the instant case are two-fold:

(a) Bankers maintains that the permit granted in 1960 *never did expire.* Because timely application for extension of that permit was made, Bankers contends that the 1960

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[6] The suit was filed in the District Court for the District of Columbia and transferred to the Southern District of Florida.

permit remains in force pursuant to 5 U.S.C. 558, which provides, in pertinent part, "when the licensee has made timely and sufficient application for renewal . . . a license with reference to an activity of a continuing nature does not expire until the application has finally been determined by an agency."

(b) Bankers further maintains that the Corps must afford Bankers an opportunity to be heard on the substantive issues which the Corps regards as impediments before reaching a determination whether the application for renewal of permit should be granted. Whatever else the Corps may do, it cannot - as it has done for over a decade – merely refuse to act.[7] Bankers contends that the Corps must take the steps pursuant to 5 U.S.C. Sections 558(c)(1), which requires "notice" and (c)(2) which requires "an opportunity to demonstrate or achieve compliance with all lawful requirements" before a permit is "withdrawn, suspended, revoked or annulled." (5 U.S.C. 558(c), (c)(1) and (c)(2).)

II. THE DECISION BELOW

The district court did not reach the merits of these substantive issues. It granted a Motion to Dismiss made by the Corps, asserting that the action is barred by sovereign immunity and that Bankers' claims are, in any event, not ripe for judicial determination. Bankers thereupon appealed to the Court of Appeals for the Fifth Circuit.

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[7] The communications to Bankers have been from the District Engineer and, under the regulations in force throughout the period, the District Engineer could grant and he could possibly defer, but he lacked authority to refuse or disapprove an application.

The Court of Appeals summarily reversed dismissal of Bankers' complaint on these procedural grounds.[8] The appellate court recognized that this result would "normally . . . require us to reverse and remand for further proceedings on the merits." But it chose not to follow the normal course: "unique circumstances" (which it did not otherwise explain) led the Court to "think it best to decide the [substantive] issues at this time." (530 F.2d 633.) Thus, without the benefit of briefs by either party or a decision by the district court on the merits, the Court of Appeals undertook to decide Bankers' claims that the permit issued in 1960 remained valid and that it was entitled to an opportunity to be heard by the Corps before the Corps reached a determination.

On the merits, the Fifth Circuit held that the 1960 permit is not in force because the Corps knowingly failed to timely act upon the renewal application and the automatic license extension provision of the statute therefore does not apply; and that the Corps could lawfully allow this result to occur without affording Bankers the opportunity to be heard because this due process requirement of the statute does not apply to applications for renewal of permit. It rested this extraordinary and unprecedented result upon these considerations:

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[8] Noting that the Corps had not even bothered to pursue the sovereign immunity claim on appeal, it held that the APA constitutes a clear waiver of sovereign immunity applicable here. It found that the issues in Bankers' complaint are a "purely legal question" and that the Corps' inaction itself constitutes "final agency action" which works a very real and severe hardship. The court thus found that the matter was ripe for judicial determination under *City of Chicago v. U.S.*, 396 U.S. 162 (1969), and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

1. Relying upon language in the permit that unless "specifically extended" it shall be null and void, the Court reasoned that because the permit was "never specifically extended," it expired by its own terms. (530 F.2d 633.) The obvious difficulty is that an agency engaged in licensing – such as the Corps – cannot abrogate the terms of Section 558(c) by language inserted in the licenses it issues. The Court of Appeals itself recognized as much and declined to rest its decision solely upon this ground.

Rather, the court below based its conclusion chiefly on its belief that Section 558(c) "was not designed to cover this kind of situation." It held that Section 558(c) "was meant to cover" – and to *only* cover – cases in which "time exigencies within the agency prevented it from passing on a renewal application" in a timely fashion. (530 F.2d 634.) In the present case, the Court held, the Corps' failure to renew prior to the December 31, 1963, expiration date was not purely a function of time but, rather, was the result of the "substantive problem" resulting from the request by the Trustees that the Corps defer action. It reasoned that the Corps could properly take into account local opposition to a fill project and found that Bankers' need to satisfy the Trustees (or to show that the Trustees have no authority over their project) was a matter "which had to be resolved before the Corps could grant a new permit." It held that the Corps' "conscious decision not to renew activated the expiration provisions of the permit" and that Section 558(c) is thus inapplicable.[9] (530 F.2d 634.) The entire analysis finds no basis

[9] The court offered a "possible alternative ground" for its holding. Asserting that the last sentence of Section 558(c) applies only to activities which "could conceivably go on indefinitely," the court (Continued)

in the statute: it does not distinguish between "time exigencies" and "substantive problems" which may result in agency failure to timely act upon an application for renewal; nor does it permit the agency to determine an application by inaction even if that is a "conscious" choice. Rather, the statute flatly states the license "does not expire" until the pending application for renewal "has been finally determined by the agency."

2. Under the analysis of the court below, the agency is not even required to afford the applicant an opportunity to show that its application conforms with all lawful requirements before making its conscious choice to fail to timely act. The court rests this result upon its assertion that Section 558(c)(2) of the APA "appears to contemplate use of the notice and hearing procedure only when some sanction has been imposed upon the licensee" and that the hearing requirement does not include failure to renew an existing permit. The court apparently felt that "as a policy matter, this is a desirable result." It stated that the Corps' current application requirements set out at 33 C.F.R. 209.120(h) (1975) are "reasonably clear"; and that Bankers will not "forever be denied its day in court" on its specific objections to these requirements which the court itself recognized raise "a serious question." It concluded that "the choice is up to Bankers to comply with the regulations or to try to challenge them." (530 F.2d 635.) The difficulty with the decision is that it af-

[9] (Continued)
suggested its inapplicability to land filling, an activity which is assertedly at an end when the land is filled in. 530 F.2d 634, fn. 13. This is simplistic: the existence or non-existence of a land fill permit has continuing legal consequences, legitimizing the land created by filling, which *does* go on indefinitely. See, *e.g., U.S. v. Moretti,* 478 F.2d 418 (5th Cir. 1973).

fords no clue as to how Bankers is to make its challenge to these requirements; under the reasoning below, Bankers must comply with *all* requirements to even gain consideration of its renewal application. This would moot any objection it might have.

The decision below thus squarely holds that an agency may control the activities subject to its jurisdiction by inaction. As the result of this inaction, Bankers has been placed for 13 years in limbo: it cannot continue its filling activities in the face of the Corps' inaction for fear of sanctions (33 U.S.C. § 406); it cannot induce or compel the Corps to act so that activities can be resumed under a renewed license.

Bankers' Suggestion for Rehearing En Banc was denied by Order entered August 4, 1976. This Petition ensued.

Reasons for Granting the Petition

The court below has placed a novel and startling interpretation upon the licensing provisions of the APA which is the foundation – the constitution – of quasi-judicial and administrative regulation. It holds that the APA permits an agency to allow a license to simply lapse by its own inaction without hearing upon a timely filed application for renewal. We believe this view is erroneous as a matter of law. The decision, in any event, has profound and far-reaching implications not only to the Corps of Engineers, but to all agencies engaged in licensing, to those who are subject to such licensing requirements, and to the reviewing courts. If agencies are to be allowed to discharge their functions by inaction, such a fundamental change in our system of regulation should be effected by this Court on the basis of briefs fully explicating the issue and its implications and *not* by the Court of Appeals,

which did so without the benefit of a decision below or the views of the parties on the merits.

A. *The Status of the Permit.* The court below reached the conclusion that the 1960 permit expired, despite the pendency of a timely filed application for renewal, on the ground that the last sentence of Section 558(c) applies *only* when the agency fails to act because of exigencies of time and does not extend a license when the agency fails to timely act, as it has here, because it perceives some substantive question with regard to it. This exceedingly limited view of the applicability of Section 558(c) finds no support in the language of the section itself. It admits of no distinction among the reasons an agency may fail to timely act which controls its applicability. It simply and plainly states that when timely application for renewal has been made, the underlying license "does not expire until the application has been finally determined by the agency." (5 U.S.C. § 558(c). We submit that it is impossible to wrest the limiting distinction made by the court below from this unqualified and unequivocal mandate.

The test devised below purports to be based upon language by Judge Friendly, who stated that the purpose of the last sentence is to assure that the valuable rights conferred upon a licensee are not lost because "the agency has not managed to decide the application before expiration of the existing license." *County of Sullivan, N.Y. v. CAB*, 436 F.2d 1096, 1099 (2nd Cir. 1971). The court below has taken this statement out of context and made entirely too much of it. Judge Friendly's views on the inefficiency of regulatory agencies are well known.[10] But

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[10] See, generally, H. Friendly, *The Federal Administrative Agencies* (1962).

the case decided by Judge Friendly did not even involve the question whether a license lapses when an agency fails to act upon a pending renewal application. Rather, the case involved an air carrier's unwillingness to continue operations beyond the time stated in its pending application. Judge Friendly held that the mere pendency of an application does not impose "an obligation beyond the term sought, which the applicant does not wish to assume" on grounds that "the whole thrust of § 9(b) is to protect applicants and licensees, not to impose unsought obligations upon them."[11] *County of Sullivan, N.Y., supra.* The case simply does not stand for the proposition for which it is cited below, that the applicability of Section 558(c) turns upon the reason that the agency fails to timely act.

That conclusion equally finds no support in *Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436 (1957) (cited below) or *Great Lakes Airlines, Inc. v. CAB*, 294 F.2d 217 (D.C. Cir. 1961) (which was not cited). Both of those cases involved temporary authorizations, amounting to an exemption from licensing. The legislative history of Section 9(b) makes plain that it is not intended to apply to a temporary authorization "which may be issued pending the determination of applications for licenses." (S. Rep. No. 752, 79th Cong., 1st Sess. 275 (1945). But the mere fact that license is issued for a stated term does not make it temporary. In this case, Bankers holds a license regularly issued under the Rivers and Harbors Act (33 U.S.C. § 403), which was in exist-

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[11] Indeed, Judge Friendly specifically pointed out that if the licensee wished to continue operating under the license beyond the date stipulated in its pending application for renewal "presumably, he can amend his renewal application or file a new one." (*County of Sullivan, supra*, at 1099.)

ence for six years and would have been regularly renewed but for the naked objection by state officials which has now been found by the state courts to be invalid. Bankers' license does not fall within the limited exception to application of Section 558(c).[12]

The standard invented below is unworkable. The distinction between failure to act as the result of mere exigencies of time on the one hand, and the existence of a substantive question, on the other is impossible to make. Cases may exist when the failure of an agency to act upon a renewal is the result of pure mismanagement. But the failure to timely act because of a perceived substantive problem is equally a function of time. In the present case, Bankers was not notified until four days prior to the stated expiration of its 1960 permit that the Corps would be unable to immediately renew. It would manifestly have been impossible for Bankers to satisfy the question raised by the Corps at that late date; but, in the view of the court below, the 1960 permit nevertheless expired because the Corps failed to timely act upon it. Protests are regularly filed against applications for renewal of license filed by radio stations, by air carriers, etc. Under the reasoning below, they – like Bankers – must be

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[12] The Fifth Circuit's suggested alternative holding that Section 558(c) does not apply to a land fill permit because land fill is not an activity of an indefinitely continuing nature, is equally unsupported. The language in Section 558(c) referring to "activities of a continuing nature" was obviously intended to distinguish between mere temporary authorizations, which allow neither permanent activity nor permanent result, and regularly issued licenses. The permit held by Bankers is such a regularly issued license; and, as we have noted, the existence of such a license has continuing legal consequences in terms of the land created pursuant to it. See *Joseph G. Moretti, supra.*

grounded or go off the air if the agency merely fails to timely act upon a perceived substantive question.

The distinction drawn by the court below in limiting the application of Section 558(c) requires a subjective assessment of the reason that action by an agency was not timely taken. It is not over-cynical to suggest that few agencies will freely concede that their failure to timely act upon a renewal application is the result of pure mismanagement. Accordingly, the decision below means that whenever a protest to a renewal of license – for air carrier, radio station or land fill – is filed, the agency can permit the valuable rights conferred by the license to expire by simply taking no action at all.

Nor is there any question that the renewal application has never been finally determined by the Corps. Although the court below characterized the Corps' position as a "conscious decision not to renew," it plainly recognized that this conscious decision was manifested through agency inaction. In concluding that the matter was ripe for judicial determination, the Court specifically relied upon the proposition that failure to act is the equivalent of a denial of a request and thus appropriate for judicial review. (530 F.2d 631-32, citing *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970.) That the Corps has merely failed to act is equally apparent from its own statements. The December 27, 1963, letter stated that it would "not be possible to grant an immediate extension of time" because of the request of the Trustees that the Corps defer action. But, far from indicating an intention not to renew the permit, the Corps specifically added that even though the permit could not be renewed prior to December 31, 1963, this "will have no effect insofar as the Corps of Engineers is concerned." Indeed, as we have noted, the December 27 letter was issued by the Regional Engineer who, under the Corps' own rules, did not even have the authority to deny an application. 33 C.F.R. 209.120(c) (1968).

For these reasons, we submit, the decision below is in error as a matter of law. There is no basis in the language of the statute, the cases decided under it or its purpose upon which to conclude that the last sentence of Section 558(c) is inapplicable because the Corps of Engineers failed to timely act as the result of a perceived substantive question. The correct rule is that *whatever the reasons* for agency failure to take timely action upon a timely filed application for renewal, the underlying license, in the very words of the statute, "does not expire" until the pending application for renewal has been finally decided. Its "whole thrust is . . . to protect" Bankers from the severe hardship and cost of the Corps' inaction. On a tortured reading of the statute, Bankers has been denied that protection here.

B. *The Opportunity to be Heard.* The decision below is all the more remarkable because it allows the Corps to extinguish the valuable rights conferred upon Bankers without even affording Bankers an opportunity to show that it is entitled lawfully to continue its licensed activity. It achieves this result by concluding that the hearing requirement of Section 558(c)(2) does not apply to an application for renewal of license. This conclusion is a corollary of the Court's principal holding: if an agency can allow a permit to be extinguished by inaction, there is no need for a hearing. Conversely, we submit, it is precisely to afford the licensee an opportunity to show its entitlement to continue its activities that the statute provides an automatic extension of the license until a final determination is made.

The statute itself defines the limited circumstances in which the notice and hearing requirements of Sections 558(c)(1) and (c)(2) are inapplicable. It requires such notice and hearing "except in cases of wilfullness or those in which the public health, interest or safety, requires otherwise." The hearing requirement applies to the "withdrawal" as well as to the "suspension, revocation, or annulment" of a license. Assuredly, the failure to renew a license constitutes a "withdrawal" of the valuable rights which that license confers. If the Congress had intended to exclude applications for renewal from the due process requirements, it could have readily and unqualifiedly done so; there is no indication in the language of the statute or its history that Congress intended their exclusion. Indeed, the thought that a hearing is not required on Bankers' renewal application may come as a surprise to the Corps: its own rules require a hearing where disputes as to issuance of a permit exist and those rules do *not* distinguish between new and renewal permits. (33 C.F.R. 209.120(p)(2)(ii)(c) (1974).

There are two limited circumstances in which the hearing requirement of Section 558(c)(2) is inapplicable. As we have narrated, the section has no application in its entirety to temporary authorizations, see *Pan-Atlantic Steamship Corp., supra; Great Lakes Airlines, supra,* and it may have no application when the rights of an entire class of licensee are extinguished as the result of agency rulemaking. See *Capital Airways v. CAB,* 292 F.2d 755 (D.C. Cir. 1961). Even in that circumstance, the agency must afford the applicant an opportunity to show that change or waiver of its newly promulgated regulation is warranted. *U.S. v. Storer Broadcasting Co.,* 351 U.S. 192, 202-05 (1956). Certainly, when the agency is involved in the issuance of regular licenses, the courts have consistently held

that the applicant must be afforded an opportunity to show compliance with all lawful requirements before a final determination is made upon the application. *E.g., American Air Transport v. CAB,* 201 F.2d 189 (D.C. Cir. 1959). The decision below is the only case of which we are aware squarely holding that the minimal due process standards of Sections 558(c)(1) and (c)(2) are inapplicable to a renewal application.[13]

The court below seeks to defend its unprecedented position on grounds that it is desirable "as a matter of policy." The policy which the court evidently seeks to effectuate is simply avoidance of the question when an application is "complete enough to deserve a hearing." The court proceeds on the apparent assumption that the denial of a right to a hearing upon a renewal application does not deprive an applicant of its day in court because the applicant "would be free to bring a suit for pre-enforcement review or injunction in the District Court." (530 F.2d 635.) It is by no means clear to us that such an action would, in fact, lie: it might well be subject to dismissal on grounds of ripeness and failure to exhaust administrative remedies. *Cf. Bankers I, supra.* Such a result is, moreover, in conceptual conflict with the views

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[13] There is language in *Hamlin Testing Labs, Inc. v. AEC,* 357 F.2d 632 (6th Cir. 1966), stating that the notice and hearing requirements of the APA are not applicable to a renewal application. (*Id.* at 637.) The case involved both wilful violations of the terms of the license and a matter of public health and safety with respect to nuclear experimentation; moreover, the license was revoked only after hearings. Because hearings were, in fact, held and the case squarely falls within the statutory exemptions from the hearing requirement, the loose language of the Court, which did not explain its statement nor cite the APA, can scarcely be considered controlling.

expressed by this Court in *Storer Broadcasting Co., supra.* It is unsound as a matter of judicial economy, shifting the initial responsibility to pass upon renewal applications from the agency to the courts.

The result reached by the Court of Appeals is ultimately illogical. Under the decision, Bankers can challenge application regulations promulgated after the original issuance of its license only by allowing the original license to expire and then filing a new application as to which a hearing must be held by the agency, if requested. *Cf. Gables-By-The-Sea, Inc. v. Lee,* 365 F. Supp. 826 (S.D. Fla. 1973). On the other hand, if Bankers wishes to maintain continuity of the rights conferred upon it by the license, it must, under the Court of Appeals' view, file an application for renewal and simultaneously embark upon a lawsuit – which may not lie – seeking pre-enforcement review or injunction of those application regulations which go beyond the scope of the agency authority. Of course, if this pre-enforcement review has not been finally concluded by the time the underlying license expires, then, under the reasoning of the Court of Appeals, the license lapses; the pre-enforcement proceeding becomes mooted; and the licensee is placed in the exact same position as if it had filed no application for renewal at all. In mandating the due process requirements of Section 558(c), Congress never intended such a bizzare and circuitous result.

For these reasons, we submit, there is no basis in the statute, in precedent or in logic for the Court of Appeals' conclusion that the Corps of Engineers may lawfully finally determine Bankers' application for renewal of permit without first affording it an opportunity to show compliance with all lawful requirements. It follows equally that the Corps cannot finally decide that application by mere

inaction. The decision below that when a renewal application is pending, an agency may, without hearing, treat as extinguished rights under a regular and validly issued license by mere inaction does violence to the language and purpose of the APA.

C. *The Implications of the Decision.* Above all, the decision below fails to consider the broad policy implications of its holding. Involving a construction of the organic statute for all agencies engaged in licensing, the precedent it establishes is applicable far beyond the confines of the Corps of Engineers.

The rationale of the decision below carves a major exception to the standards which this Court has established for judicial review of regulatory bodies. *SEC v. Chenery Corp.,* 318 U.S. 80 (1943); *Burlington Trucklines v. U.S.,* 371 U.S. 156 (1962), and *Universal Camera Corporation v. NLRB,* 340 U.S. 474 (1950): in the case of applications for renewal of license these standards no longer apply. It is no longer necessary that the agency's determination be based upon "substantial evidence." *Burlington Trucklines, supra.* A naked objection by any third party – which in this case has so far been found invalid by the state courts – will enable regulatory agencies to allow the license to expire by consciously deciding to do nothing. It may, moreover, do so without any need to set forth findings and conclusions which purport to justify its action. Under the decision below, this Court's statement in *Chenery Corp.,* at p. 84, that an agency's "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the act" is inapplicable to renewal applications. The agency can discharge its regulatory function by doing nothing and offering no reasons for its results. Regulatory

agencies are thus afforded virtually unlimited and unreviewable discretion to deal with applications for renewal of license as they see fit.

Moreover, the Fifth Circuit's decision enables regulatory agencies to make policy by simply avoiding the hard questions which may confront them. The Court of Appeals noted that the Corps' failure to act upon Bankers' renewal application resulted from its "not desiring to resolve any underlying disputes" as to the sufficiency of the Trustee's objections. We have no doubt that the Fifth Circuit has correctly identified the wellspring of the Corps' inaction. But the Court of Appeals itself recognized that the Corps cannot blindly delegate responsibilities to a state entity and has a duty "independently to evaluate the merits of the local objection" and the other issues. (530 F.2d 634.) All that Bankers seeks is the opportunity to show that its renewal application meets all lawful requirements and for the Corps to decide whether Bankers should be allowed to continue its operations. For 13 years the Corps has successfully avoided taking any action at all. Throughout that entire period Bankers' land fill activities have been in suspense; and with each passing year the cost to Bankers of agency inaction grows and grows. A determination upon Bankers' application may involve considerations regarding ecological and economic matters. But that is the function which the Corps is supposed to perform, and our system of justice does not provide for a suspension of action merely because questions affecting public and private interests arise.

That is exactly the vice of the decision below. The necessary effect of the decision below is to judicially confirm the Corps' avoidance of its duty. By authorizing an administrative agency to discharge its functions through inaction, the decision below reenforces the proclivity toward

"glacial inertia," to which all administrative agencies seem peculiarly subject and of which the courts quite properly complain. (530 F.2d 636.)

We submit that the fundamental change in our system of regulation and of judicial review of administrative agencies worked by the decision below is contrary to the most basic precepts of the administrative process. Certainly, such a fundamental change ought not to be made, as it has been here, without the benefit of a decision by the District Court or briefs on the merits from the parties. If a fundamental change in the direction of our system of regulation is to be effected, we submit, it must be made by this Court and on the basis of briefs fully developing the issues involved and their implications.

CONCLUSION

For these reasons, it is respectfully requested that the instant Petition for Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ian D. Volner, hereby certify that I have, this 2nd day of November, 1976, sent by First Class United States Mail, postage prepaid, a copy of the foregoing Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit to the following:

Solicitor General
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Ian D. Volner

APPENDIX A

BANKERS LIFE & CASUALTY CO.,
Plaintiff-Appellant,

v.

HOWARD H. CALLAWAY,
Secretary of the Army, et al.,
Defendants-Appellees.

No. 74-3571.

United States Court of Appeals,
Fifth Circuit.

April 21, 1976.

Appeal from the United States District Court
for the Southern District of Florida.

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

GOLDBERG, Circuit Judge:

Nineteen years ago, Bankers Life and Casualty Company (Bankers) first acquired a dredge and fill permit from the Army Corps of Engineers, issued pursuant to the Rivers and Harbors Act, 33 U.S.C. §403. Today Bankers stands before this Court for the second time in five years, struggling to extricate itself from the morass of bureaucratic inaction. Relying on section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), it asks for a declaration that its permit rights under its 1960 permit have

* Of the U.S. Court of Claims, sitting by designation.

never expired and for an injunction ordering the Corps to hold a hearing on its renewal application. The district court, in an order bare of reasons, dismissed the complaint in response to the Government's invocation of the sovereign immunity and want of ripeness defenses. Although we find that neither of these grounds warranted dismissal, we think the trial court's disposition was correct, for under our reading of section 9(b) of the APA, Bankers cannot prevail on the merits.

I. FACTS

At the risk of miring the reader in a bog of detail, we have chosen to discuss the facts, which are undisputed for the most part, fairly extensively, in order to place the complex administrative law questions in context. We begin by reproducing the account of the background of this litigation that appeared in our first opinion:[1]

The history of this effort by Bankers to turn part of the waters of Lake Worth into land may be summarized as follows. On April 17, 1957, Bankers paid the Florida State Board of Trustees of the Internal Improvement Trust Fund of Florida (the state agency which at that time could appropriately deal with the matter) the sum of $26,000 for the use of 2,500,000 cubic yards of fill. Much of the fill, approximately 1,116,170 cubic yards, was consumed in the filling of other lands by Bankers and is not part of the subject matter of this action.

On February 15, 1957, Bankers applied to the Corps of Engineers for a permit to fill the property, and this was

[1] *Bankers Life & Casualty Co. v. Village of North Palm Beach*, 5 Cir. 1972, 469 F.2d 994, *cert. denied*, 1973, 411 U.S. 916, 93 S. Ct. 1543, 36 L.Ed. 2d 307.

granted on or about April 29, 1957. There was nothing in the Federal Statutes at the time that required the Corps of Engineers to consider conservation, and there is nothing in the record to indicate that any study of possible ecological effects was made at that time. The permit which was issued carried the following statement on its face.

> "That this instrument does not give any property rights either in real estate or material, or any exclusive privileges."

It also stated that:

> "If the structure or work herein authorized is not completed on or before the 31st day of December, 1960, this permit if not previously revoked or specifically extended, shall cease and be null and void."

At the request of Bankers, the Corps, in December, 1960, extended the permit to December 31, 1963. The extension also contained the statement that if work authorized by the permit was not completed during the period of extension the permit would become null and void if not previously revoked or specifically extended. On December 16, 1963, the Trustees wrote the Corps a letter requesting that final consideration of Bankers' application for another permit extension be deferred pending Bankers' receipt of a local fill permit in accordance with Florida Statute Section 253.124, F.S.A. The Corps agreed to defer Bankers' permit extension and on December 27, 1963, informed Bankers that it would not be possible to grant an immediate extension at that time because of Corps policy when there was local objection.

For several years no further action was taken as between Bankers and the Corps of Engineers. During this time various attempted settlements of disputes were negotiated

between Bankers, the State of Florida and the Village of North Palm Beach concerning the title of the submerged lands sought to be filled. On December 6, 1968 and March 17, 1969, Bankers corresponded with the Village in an effort to obtain a local fill permit. In June, 1969, the Village informed Bankers that a permit would be granted; however, shortly thereafter on July 10, 1969, the Village undertook to rescind this action.

By letter dated July 10, 1969, the same date as the meeting of the Village Council rescinding the action of June, Bankers addressed a letter to the Corps of Engineers stating that a permit had been received by letter from the Village of North Palm Beach and stating that "in as much as there were no other objections to the extension of the permit, as stated in your letter of December 27, 1963, to us, I trust this removes the final obstacle and you will grant the extension requested promptly."

The Corps of Engineers, obviously not desiring to resolve any underlying disputes as to whether the requirements referred to in the original request to the Corps from the Trustees had all been met, responded by letter of July 18, stating "it will still be necessary, however, that the written approval of the Trustees of the Internal Improvement Fund be furnished before further action can be taken on your application."

The status of the matter thus was that the state agency had requested that the application be held up in December, 1963. The Corps of Engineers had held it up, indicating that once the matters referred to in the state's letter were cleared it would be the purpose of the Corps of Engineers to proceed with an issuance of the extension. However, it was not until more than five years later that Bankers undertook to inform the Corps that it considered

the conditions previously existing to have now been satisfied. The Corps of Engineers, quite appropriately, we think, deferred its action until it obtained a "go ahead" from the Trustees, the state body which had originally requested the deferment of the issuing of the permit.

Bankers Life & Casualty Co. v. Village of North Palm Beach, 5 Cir. 1972, 469 F.2d 994, *cert. denied*, 1973, 411 U.S. 916, 93 S. Ct. 1543, 36 L.Ed. 2d 307 (hereinafter referred to as *Bankers I*).

Thus, to recapitulate, as of December 31, 1963, Bankers was told that it needed two permits in order to conduct its fill operations legally: the Rivers and Harbors Act permit, which it had already held for over six years, had to be renewed, and a local permit from the Village of North Palm Beach had to be secured. Since the Corps refused to grant an extension of the Rivers and Harbors Act permit until the Trustees officially withdrew their objection, and since Bankers took the position that all legal obstacles had been removed, the parties had reached an impasse which led to Bankers' first lawsuit.

II. *Bankers I*

Bankers' theory in its first effort to assure that it held a valid federal permit proceeded as follows: (1) But for the trustees' intervention, the Corps would have extended the permit in December 1963; (2) the Trustees, as a matter of Florida law, had no power to require a local permit under Florida Statutes § 253.124; and therefore, (3) the original intervention was without effect, and the Corps should be compelled to renew the 1960 permit or issue a new permit.

The district court agreed with this reasoning, and entered two significant orders: it directed the Corps to grant the Rivers and Harbors Act permit without reference to local permits or ecology; and it decreed that Bankers had the right to fill without a section 253.124 permit, and that upon completion of the filing (sic) project, title in the land should be quieted in Bankers.

This Court reversed on both points. First, it held that even if the Trustees had been wrong as a matter of state law, it was still error to require the Corps to issue its permit. Primarily, this was because the grant or denial of a permit is not a purely ministerial act. Over the time period since the Trustees first voiced their objection, the Corps had acquired new obligations to consider various environmental factors, all of which applied to Bankers. Rather than filing a formal application with the Corps, Bankers chose to file a lawsuit. Rejecting this approach, the Court held that "[t]he matter was not ripe for court action because the official of the government, who was empowered to act, had not been given an opportunity to perform the duties imposed on him by the federal statutes." 469 F.2d at 999.

With regard to the state law rulings the district court had agreed with the two premises offered by Bankers: that the Trustees' request was the sole impediment to renewal, and that the Trustees had no power to block Bankers' permit. It based the latter holding on its determination that Florida Statute section 253.124, which was added by Laws of Florida, Act of 1957, Ch. 57-362, § 4, did not apply to Bankers by virtue of the grandfather clause contained in section 11 of the Act of 1957.

At this juncture, it becomes important to understand some of the intricacies of Florida law relating to riparian

owners' rights in submerged lands. As described in *Bankers I*, at 469 F.2d 997 n. 3, the applicable law prior to the Act of 1957 was the Butler Act of 1921. Under the Butler Act, riparian owners could by the act of filling submerged lands up to a certain line acquire actual title to the new land. The Act of 1957 abolished this procedure and declared that title to the submerged lands was in the Board of Trustees of the Internal Improvement Trust Fund. *See* Florida Statutes § 253.12 (1975). Before the Trustees can convey any interest in the submerged land, the applicant must secure a fill permit. *See id.* § 253.124. It was this permit to which the Trustees referred in their letter of December 16, 1963.

Bankers' assertion that the Trustees were not authorized to require a section 253.124 permit relied on the exemption contained in Laws of Florida, Act of 1957, Ch. 57-362, § 11, which provided that the provisions of Chapter 57-362 would not "affect or apply to the construction of islands or the extension or addition to existing lands . . . which was commenced or application for permit to fill which was filed with the United States corps of engineers prior to [June 11, 1957]. . . ." Bankers' original application for a federal permit had been filed on February 15, 1957, and the permit had been granted on April 29, 1957 – both dates well before that mentioned in the statute. Two critical points, however, were in dispute – one factual and one legal. The factual dispute concerned whether Bankers had actually started filling the land prior to June 11, 1957;[2] the legal dispute was whether

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[2] In this Court's first opinion, a discrepancy between the parties' stipulation and the district court's findings of fact was noted on this point. This Court therefore found the district court's finding clearly erroneous.

the exemption ceased to be available when the 1957 permit expired in 1960, as a matter of Florida law. The district court's decree quieting title in Bankers resolved the exemption question in Bankers' favor. This Court found it unnecessary to reach the issue because of the factual dispute. Thus, on remand the district court was directed to dismiss the federal defendants and to conduct further proceedings on the title question – possibly to certify that issue to the Florida courts.

III. *Bankers II*

Taking this Court's advice, Bankers turned to the state courts for adjudication of the question whether it was entitled to the benefits of the grandfather clause in the Act of 1957.[3] On March 8, 1973, Bankers filed its complaint in the instant case.[4] Invoking jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, Bankers

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[3] Bankers instituted a suit for a declaratory judgment in the Florida Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. On January 8, 1975, that court issued its judgment declaring that Bankers was entitled to fill the bottom lands without first securing a permit from the Trustees in accordance with section 123.124. The Trustees filed their notice of appeal from that decision to the District Court of Appeals of Florida on February 24, 1975. To date, that court has not rendered a decision, although at oral argument counsel informed us that the case was argued on October 8, 1975, before the appellate court. Whichever way that court decides, however, the unsuccessful party of course has the option of appealing to the Florida Supreme Court.

[4] The complaint was originally filed with the United States District Court for the District of Columbia. On defendant's motion for a change of venue pursuant to 28 U.S.C. § 1404(a), the case was transferred to the Southern District of Florida.

made the following allegations: (1) it was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law for the Corps to defer action on the renewal permit until a local permit was secured [5 U.S.C. § 706 (2)(A)]; (2) the Corps, in contravention to 5 U.S.C. § 555(b), has not proceeded to conclude the matter presented to it; (3) the Secretary of the Army, the Chief of Engineers, and the District Engineer have unlawfully withheld or unreasonably delayed agency action [5 U.S.C. § 706(1)]; (4) Bankers' rights under the original permit have never expired [5 U.S.C. § 558(c)]; and (5) because a refusal to renew is the equivalent of "withdrawal, suspension, revocation, or annulment," Bankers is entitled to a hearing pursuant to 5 U.S.C. § 558(c). By way of relief, Bankers asked for declarations that there has been unreasonable delay and that the permit rights never expired, and for an order requiring the Corps to hold a hearing on its application for renewal.

Before discussing the district court's dismissal of this complaint, we think it appropriate to stress that this is not the same lawsuit as *Bankers I*, though some of the allegations overlap. Points (1) through (3), all attacking the Corps' delay in processing the renewal application, do seem to be so close to the first stage as to be governed by it. To the extent that these paragraphs ask only that the Corps rule now on the application for renewal one way or another, our discussion of Bankers' present right to a hearing will be dispositive.

Points (4) and (5) raise issues of statutory interpretation that were not considered in *Bankers I*. Both rely on section 9(b) of the APA, 5 U.S.C. § 558(c), which provides as follows in pertinent part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Point (4), which asserts that Bankers' rights under its 1960 permit are still in effect, relies on the last sentence of the quoted portion. Far from being a request to order the Corps to act on the application, point (4) merely raises the question whether this portion of the APA conferred interim rights on Bankers pending the Corps' decision. Point (5), which asserts a right to a hearing, relies on section 558(c)(2). Again, Bankers is not asking the Court to order the Corps to rule one way or another; it is simply maintaining that the APA gives it a right to a hearing at this time since its permit was not renewed. Both of these issues, therefore, are narrow questions of statutory interpretation. They are not disguised reruns of the first case.

The Corps moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure on grounds of lack of jurisdiction due to the sovereign immunity bar and failure

to state a controversy that is ripe for judicial decision. After a flurry of memoranda had exchanged hands, the court granted the motion, in an order hardly to be faulted for prolixity.[5] We assume that the court's granting of defendants' motion indicated its agreement with one or both of the points raised in the motion to dismiss and structure our discussion accordingly.

A. Sovereign Immunity

[1] We need not pause long over the sovereign immunity defense – indeed, the Corps has not even bothered to pursue this argument on appeal. Since *Estrada v. Ahrens*, 5 Cir. 1961, 296 F.2d 690, the law of this Circuit has been that "the [APA] . . . makes a clear waiver of sovereign immunity in actions to which it applies." 296 F. 2d at 698. *See United States v. Joseph G. Moretti, Inc.*, 5 Cir. 1973, 478 F.2d 418, 432. *Cf. Warner v. Cox*, 5 Cir. 1974, 487 F.2d 1301, 1305 (APA does not constitute waiver of sovereign immunity in suit seeking money damages against United States). Thus, the real question is whether the review provisions of the APA apply to the

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5 The order read:

"THIS CAUSE having come before the Court on motion *to dismiss by defendant Robert F. Foehlke [sic], Secretary of the Army, et al.*, and the Court having considered the record in this cause, and being otherwise duly advised, it is ORDERED AND ADJUDGED that said motion is *granted.*" (Underlining denotes typed words; remainder appeared on a printed form.) We note that the district court was technically justified in adopting this method of disposition, since Rule 52 provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule[s] 12. . . ."

type of agency action involved here, which brings us to the second ground of the motion to dismiss.

B. Ripeness

Our discussion of the ripeness *vel non* of the two questions we have indicated were before the trial court must begin with *Abbott Laboratories v. Gardner,* 1967, 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed. 2d 681. *Abbott Labs* established a method for analyzing cases in which the timeliness of judicial review poses a problem. First, the court must determine whether Congress in the governing statute intended to preclude pre-enforcement review of the agency action at issue. In this connection, it is essential to give weight to the general presumption favoring reviewability. *See Dunlop v. Bachowski,* 1975, 421 U.S. 560, 566, 568, 95 S. Ct. 1851, 1857-58, 44 L.Ed. 2d 377, 386, 387; *Chicago v. United States,* 1969, 396 U.S. 162, 90 S. Ct. 309, 24 L.Ed. 2d 340; *Citizens Comm. for the Hudson Valley v. Volpe,* 2 Cir., 425 F.2d 97, *cert. denied,* 1970, 400 U.S. 949, 91 S. Ct. 237, 27 L.Ed. 2d 256; *Textile and Apparel Group v. FTC,* 133 U.S. App. D.C. 353, 410 F.2d 1052, 1054, *cert. denied,* 1969, 396 U.S. 910, 90 S. Ct. 223, 24 L.Ed. 2d 185. If the statute does not preclude review, the court must consider whether the controversy is "ripe" for judicial resolution. This determination contains two aspects: the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. Fitness of the issues for judicial decision also depends on two factors: whether the issue is a purely legal one and whether the agency action challenged is "final," taking a flexible view of that term of art. Hardship to the parties contemplates an immediate and direct impact; a certain expectancy of compliance with the agency's action must be

present. The dilemma of complying with extremely onerous regulations or risking criminal penalties for noncompliance will often be a strong factor in favor of immediate review. *E.g., Abbott Laboratories v. Gardner, supra,* 387 U.S. at 152-53, 87 S. Ct. at 1517, 18 L.Ed. 2d at 693, 694; *Frozen Food Express v. United States,* 1956, 351 U.S. 40, 76 S. Ct. 569, 100 L.Ed. 730.

[2, 3] *1. Status of the 1960 Rivers and Harbors Act permit.* Applying these principles to the question of the present vitality of the 1960 permit, we find that the issue is ripe for decision. Since the dredge and fill permit underlying this controversy was issued pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.,* our first question is whether Congress intended to preclude judicial review under that statute. The Second Circuit, noting that the statute itself was silent both as to availability of judicial review and as to manner of appeal, concluded that review was available under the APA. *Citizens Committee for the Hudson Valley v. Volpe, supra,* 425 F.2d 97. Finding no reason to disagree with that conclusion, we hold that agency action under that Act is reviewable.

Whether the controversy is ripe for resolution depends, in part, on what "agency action" is at issue. Section 551 (13) of the APA defines "agency action" to be "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Section 551(9) defines "licensing" to include "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." These definitions are made applicable to the judicial review chapter of the statute through section 701(b)(2), 5 U.S.C. § 701(b)(2). Finally, section 704 provides that "[a]gency action made

reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

We think it fair to say that the Corps of Engineers has taken the firm position that Bankers' rights under its 1960 permit were not extended by virtue of 5 U.S.C. § 558(c).[6] This position – that the permit rights expired at the end of 1963 – can be characterized as "agency process respecting the . . . renewal . . . of a license," since "agency action" can encompass the denial of the requested action as well as the grant thereof.[7]

Review of this "agency action" presents a question that is purely legal, *i.e.*, does section 558(c) prevent the expiration of rights under a Rivers and Harbors Act permit in a situation where local authorities have indicated that a local permit is necessary. Furthermore, the requirement of "final" agency action is satisfied here. The action is "final in the sense that it is an at least firm (and perhaps binding) adoption of a position by the agency with regard to a course

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[6] For example, in the letter written by the Corps to Bankers on December 27, 1963, the Chief of Operations referred unequivocally to the "lapse in the permit." Similarly, in the present lawsuit the Corps attached to its Memorandum in Support of Defendant's Motion to Dismiss a letter from the District Engineer to Bankers which clearly demonstrated the Corps' belief that Bankers has no permit rights currently. The letter also questioned the present sufficiency of the application for renewal. *See* part III. C.I., *infra.*

[7] *Cf. City of Chicago v. United States,* 1969, 396 U.S. 162, 90 S. Ct. 309, 24 L.Ed. 2d 340 (no distinction between "negative" and "affirmative" orders); *Environmental Defense Fund, Inc. v. Hardin,* 1970, 138 U.S. App. D.C. 381, 428 F.2d 1093 (failure to act is equivalent of denial of request).

of conduct on the part of a member of the regulated industry which does not require further administrative action other than the possible imposition of sanctions." *Northeast Airlines, Inc. v. CAB,* 1 Cir. 1965, 345 F.2d 662, 664. Were Bankers to test the correctness of its position, it would expose itself to possible criminal penalties under section 12 of the Rivers and Harbors Act, 33 U.S.C. § 406. Judicial review at this time would not "disrupt the orderly process of [agency] adjudication," and it cannot be gainsaid that "rights or obligations have been determined" by the Corps' position. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Trans-Atlantic,* 1970, 400 U.S. 62, 71, 91 S. Ct. 203, 209, 27 L.Ed. 2d 203, 210.

The hardship to the parties of withholding consideration would also be great. If Bankers is right, then it would be able to commence filling operations immediately. Because of the criminal sanctions in the Act, it is highly unlikely that Bankers will choose to test its position by action. If Bankers is wrong, then at least it will learn what the true status of its permit is and what steps it must take to secure a valid permit. Viewing all these factors realistically, we find that the hardship factor of the *Abbott Labs* test is satisfied.

Thus, having found hardship, final agency action, a purely legal question, and no statutory bar to judicial review, we hold that the question whether the 1960 permit rights were extended by force of 5 U.S.C. § 558(c) was and is ripe for judicial resolution.

2. Entitlement to an administrative hearing on the application for renewal. Like the permit status issue, this point relates to the Rivers and Harbors Act. It also involves the regulations pertaining to permit applications before the Army Corps of Engineers, 33 CFR § 209.120

(1975). Since nothing precludes judicial review of these regulations generally, we move directly to the question of ripeness.

The Corps' position on this point is that Bankers' application for renewal is incomplete, and therefore that no hearing is required now. However the legal basis for this conclusion is characterized – want of ripeness, or statutory construction of 5 U.S.C. § 558(c)(2) – it is clear that the Corps is refusing to hold a hearing now. Thus, again we find in the Corps' unequivocal position the sort of "agency action" that could be reviewed by a court.

The questions raised by Bankers are again purely legal ones: what does section 558(c)(2) mean, and does it apply to refusals to renew. If this is the kind of situation in which a party is entitled to a hearing before the agency, this Court could order such a hearing to be held.[8] For the same reasons as we found the requisite finality for the status issue, we find here that the agency's firm position on Bankers' lack of a right to a hearing presents final agency action.[9] Finally, the hardship to the parties of withholding consideration would be great. Bankers has

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[8] Ordering a hearing is, of course, quite different from ordering a permit to be issued, since ordering a hearing does not direct the agency personnel how to exercise their discretion.

[9] Bankers seems to be arguing that it should have a hearing at which the Corps tells it what to include in the application for renewal. This position assumes that the Corps might change the requirements from those printed at 33 CFR § 209.120 (1975), in response to Bankers' legal arguments. In our opinion, the record clearly shows that this is a futile hope.

no other forum to which it can turn to vindicate its asserted right. We therefore find that this claim is also ripe for judicial resolution.

Although normally a conclusion that the lower court erred in dismissing a case on ripeness grounds would require us to reverse and remand for further proceedings on the merits, in the unique circumstances of this case we think it best to decide the issues at this time. *See Independent Broker-Dealers' Trade Ass'n v. SEC,* 142 U.S. App. D.C. 384, 442 F.2d 132, 135, *cert. denied,* 1971, 404 U.S. 828, 92 S. Ct. 63, 30 L.Ed. 2d 57; *Textile and Apparel Group v. FTC, supra,* 410 F.2d at 1053. With the important facts undisputed, and the issue purely one of statutory interpretation, little could be gained by further development of the record in the district court. Conversely, resolution of the federal issues might be of some aid in the adjudication of the state title questions.[10] Thus, we reject the parties' invitation to abstain from deciding the merits of the controversy and turn to the questions presented.

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[10] The pendency of the state litigation on the land title question (see note 3, *supra*) does not render these claims unripe. The claim about the non-expiration of federal permit rights is a pure question of federal law. It is our view that the status of the permit had to be determined as of the time the Trustees entered their objection to renewal. We note that this objection was based on an honest view of the applicable Florida law, which this Court has already held the Trustees could reasonably have adopted. *Bankers I,* 469 F.2d at 1001. Whether or not the Trustees' position is ultimately upheld thus will not affect the resolution of the question before us. *See* note 12, *infra,* and accompanying text.

(Cont'd)

C. The Merits

1. Status of the 1960 Rivers and Harbors Act permit. Bankers relies heavily on the language of section 558(c) providing that when the licensee has made a timely and sufficient application for renewal, a license with reference to an activity of a continuing nature does not expire until the agency has finally ruled on the application. Bankers also points to a letter which it received from the District Engineer, in which the Corps said "[t]he lapse in the permit will have no effect insofar as the Corps of Engineers is concerned," and to the fact that under the Corps regulations then in effect the District Engineer had no authority to refuse or disapprove an application. *See* 33 CFR § 209.120(c) (1968). On the other hand, the permit itself clearly stated that "this permit if not previously revoked or *specifically* extended, shall cease and be null and void." (Emphasis added). In addition to relying on this language, the Corps also argues that section 558(c) does not apply unless the application is sufficient. At the time the renewal

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10 (Cont'd)

Likewise, Bankers' right to a hearing does not depend on the outcome of the state litigation. As we understand the argument, Bankers asserts that it is entitled to a hearing before the Corps at which it can demonstrate that it has complied with all *lawful* requirements for an application and can attack those requirements that it considers unlawful. Its argument about the Trustees' power to block the federal permit is only one of a number of challenges to the application regulations. Thus, if Bankers wins in the state courts, it would still want to present to the Corps questions such as which sections of the Federal Water Pollution Control Act apply to it (33 U.S.C. § 1251 *et seq.*). If the Trustees win in the state courts, Bankers would simply add its challenge to the list of questions for the Corps to adjudicate.

application was filed, it was insufficient because it lacked the required local consents. As time passed, it became more incomplete with the addition of new laws requiring the Corps to take ecological considerations into account for dredge and fill permits.[11]

It might be possible to dispose of this point by relying solely on the language of the permit. Clearly, the permit was never specifically extended; thus, by its own terms, it became null and void upon the date of expiration. However, we need not stand or fall on this ground, for we believe that section 558(c) was not designed to cover this kind of situation.

[4] First, we note that the Corps could properly take local opposition to a fill project into account. We need not decide whether local objections could always operate as a veto over Corps projects, no matter how insubstantial or frivolous, because that case is not before us.[12] Rather,

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11 Our first opinion in this case held that the more stringent requirements of the present apply to Bankers. *See* 469 F.2d at 998. The strong national commitment to improvement of the environment also argues strongly for application of new laws such as the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, wherever possible.

12 In order to avoid the defect of unlawful delegation to the state authorities, it might be necessary to require the Corps independently to evaluate the merits of the local objection. However, since the objection of the Trustees here was clearly a substantial one, we need not decide the extent of any such duty in this case.

we have the body in Florida with ultimate responsibility over the use of public lands, the Trustees of the Internal Improvement Trust Fund, informing the Corps that the law of Florida requires a local permit for fill work. In almost all the recent environmental legislation, Congress has indicated its desire for federal agencies to cooperate closely with state authorities. *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251(b), (3); National Environmental Policy Act, 42 U.S.C. §§ 4331(a), 4332(2)(C); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857(a). Under all the circumstances, we believe that the Corps' policy of deference to local objections was justified in the case now before us. Thus, Bankers' application for permit renewal contained one deficiency at the time the Corps had to decide whether to extend the permit.

Judge Friendly described the purpose and effect of the section of the APA at issue in the following manner:

> The final sentence [of § 558(c)] provide[s] that if the licensee has timely sought renewal, the valuable rights conferred by a license for a limited term shall not be lost simply because the agency has not managed to decide the application before expiration of the existing license. As Mr. Justice Burton said, dissenting in *Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436, 444-445, 77 S. Ct. 999, 1005, 1 L.Ed. 2d 963 [, 969] (1957), in a passage with which the majority did not express disagreement:
>
> > The policy behind the third sentence of § 9(b) is that of protecting those persons who already have regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of a license before the agency finds time to pass upon its renewal.
>
> See also Attorney General's Manual on the Administrative Procedure Act 91-92 (1947).

County of Sullivan v. Civil Aeronautics Board, 2 Cir. 1971, 436 F.2d 1096, 1099. This reasoning suggests that the kind of case that the statute was meant to cover was that in which time exigencies within the agency prevent it from passing on a renewal application, where an activity of a continuing nature such as radio broadcasting or shipping services is involved.

[5] By contrast, in the case before us time exigencies played no part in the Corps' refusal to renew. Instead, a substantive problem arose with the application, which had to be resolved before the Corps could grant a new permit.[13] The Corps' conscious decision not to renew activated the expiration provisions of the permit. Thus, after the period specified in the 1960 permit expired, all rights under the permit expired with it.

[6] *2. Entitlement to an administrative hearing on the application for renewal.* Bankers' second assertion is that section 558(c)(2) of the APA entitles it to a hearing before the Corps at which it is given an opportunity to demonstrate or achieve compliance with the requirements for

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[13] A possible alternative ground for our holding is that filling land is not an activity of a continuing nature, but is instead a project that will end as soon as all the land is filled in. Radio broadcasting, in contrast, could conceivably go on indefinitely. Since section 558(c) applies only to activities of a continuing nature, it would not extend Bankers' rights under the fill permit.

a dredge and fill permit application. The statute provides that "the withdrawal, suspension, revocation, or annulment" of a license is lawful only after notice and a hearing. It appears to contemplate use of the notice and hearing procedure only when some sanction has been imposed on the licensee. *Cf. Blackwell College of Business v. Attorney General*, 1971, 147 U.S. App. D.C. 85, 454 F.2d 928, 933-34; *H. P. Lambert Co. v. Secretary of Treasury*, 1 Cir. 1965, 354 F.2d 819, 821 n. 2. The alternative construction of the statute, urged by Bankers, would provide that the "withdrawal" of a permit or license includes a failure to renew an existing license.

For several reasons, we believe that the former reading of the statute is truer to its language and more desirable as a policy matter. A paraphrase of the provision taken as a whole might read "before an agency can institute proceedings to withdraw, revoke, etc., an existing license, it must provide the licensee with notice in writing of the offending conduct and a hearing at which the licensee can refute the charges." Read this way, it is clear that Bankers is not entitled to a hearing under this section of the Act. As a policy matter, this is a desirable result. Assuming that an applicant wanted to challenge some of the requirements for an application contained in the agency's regulations, the question arises, at what point would the application be complete enough to deserve a hearing? If the party wanted to try to enjoin the agency from enforcing a specific regulation that it asserted was beyond the agency's power to promulgate, then it would be free to bring a suit for pre-enforcement review or injunction in the district court.

Challenges to application requirements raise a unique problem in administrative law, since the agency could

refuse to consider the challenge until the regulations were complied with and the case moot. However, this dilemma does not convert section 558(c) into a statute giving the right to a hearing on application regulations. Despite Bankers' lamentations that it does not know what the Corps wants, we think that the application requirements set out in 33 CFR § 209.120(h) (1975) are reasonably clear. Similarly, the state authorities would probably be happy to tell Bankers what local permits are required. As long as the possibility of a pre-enforcement challenge to specific objectionable portions of the regulations exists, we cannot say that Bankers will forever be denied its day in court.[14] As the case now stands, Bankers has a choice between transiting its way through the terrain of the Corps' application regulations or attempting to challenge them.

IV. Conclusion

This is a case of much suspension, and little animation. Without throwing any mud on any litigant's face,

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[14] We certainly cannot say that all of Bankers' points are frivolous in this regard. For example, the Corps requires certifications under section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341, for a dredge or fill permit. 33 CFR § 209.120(h)(2)(ii) (1975). Bankers contends that this regulation goes beyond the statutory authorization, since section 404 of the Act deals with dredge and fill permits, and it contains no certification requirements. *See* 33 U.S.C. § 1344. This raises a serious question about the scope of the regulation which might well be justiciable in a proper court proceeding. We see no need, though, to require the Corps to pass on this matter again, under some sort of primary jurisdiction theory. The choice is up to Bankers to comply with the regulations or to try to challenge them.

we note that this case has had more backing than filling. Many of Bankers' problems are swamped by history, but Job-like sufferings and patience cannot change the law as we find it in the Administrative Procedure Act, the federal environmental legislation, and the Florida laws pertaining to submerged lands. We cannot carve exceptions from the APA for Bankers because the history of its litigation is tortuous and tortured.

In the interest of efficient judicial administration (if, indeed, one can speak of efficiency with a straight face with reference to a case now nineteen years old), we have deemed it best to rule on the merits of Bankers' claims under the Administrative Procedure Act. If Bankers' earnest protestations at oral argument that it desired only to be enlightened as to what it must do in order to have the right to fill its land are given credence, then our disposition should satisfy all concerned. Though the district court was mistaken in its conclusion that the case was unripe, our consideration of the fully matured issues has led us to reject Bankers' claims. Since our affirmance of the district court's order is based on our opinion of the merits we note that the dismissal should be one with prejudice. Now that the administrative path has been cleared of underbrush, both parties should proceed to discharge their respective responsibilities for achieving a solution without sloth and delay. Let not any further glacial inertia mark this case as a relic of the Pleistocene epoch.

AFFIRMED

United States Court of Appeals

EDWARD W. WADSWORTH
Clerk

Fifth Circuit

Office of the Clerk

* * *

August 4, 1976

TO ALL COUNSEL OF RECORD

No. 74-3571 – Bankers Life & Casualty Co. v.
Howard H. Callaway, etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. William T. Kirby
Mr. Martin J. Gaynes
Mr. Wallace H. Johnson
Messrs. George R. Hyde
Edward J. Shawaker

Received
Aug. 5, 1976
LAW OFFICES OF COHN & MARKS

APPENDIX B

ADMINISTRATIVE PROCEDURE ACT

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

* * *

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 388.

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